IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 25TH JULY 2007 / 3RD SRAVANA 1929

SA.No. 484 of 1994()

AS.13/1991 OF THE SUBORDINATE JUDGE OF TELLICHERRY
OS.292/1986 of MUNSIF COURT, KUTHUPARAMBA
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APPELLANT: APPELLANT:DEFENDANT:

KUTTIKANDI KUNHIKANNAN,
S/O.OTHEYANAN,
PULLANCHIYOT, MUZHAKUNNU AMSOM,
PALA DESOM, TELLICHERRY.

BY ADV. SRI.V.SIVASWAMY
SRI.V.V.ASOKAN
SRI.K.I.MAYANKUTTY MATHER
SRI.R.RAJESH
SMT.JIJIMOL J.VADAKKEN

RESPONDENT:RESPONDENT:PLAINTIFF:

MUNDAYADAN GOVINDAN NAMBIAR,
HOUSE NO.6/215, MUZHAKUNNU AMSOM,
PALA DESOM, TELLICHERRY.

BY ADV. SRI.K.T.SHYAM KUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 25/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.922/1994 IN S.A.NO.484/1994

DISMISSED

25/07/2007 **SD/-M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 484 OF 1994

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DATED THIS THE 25th DAY OF JULY, 2007

JUDGMENT

Defendant in O.S.292 of 1986 on the file of Munsiff Court, Kuthuparamba is the appellant. Plaintiff is respondent. Respondent instituted the suit seeking a decree for permanent prohibitory injunction contending that plaint schedule property originally belonged in jenmom to Pullancheri illom and was taken on lease by his father Appa Nambiar as per Ext.A1 registered marupat dated 6.4.1956 and under Ext.A2 will executed on 30.12.1983, father bequeathed plaint B schedule to respondent and plaint A schedule property is item No.1 of plaint B schedule property and on the death of the father, he became the absolute owner in possession of the property and there is well demarcated boundaries on all sides and appellant is in possession of the property which lies to the eastern side of the plaint schedule property and he removed some stones from the boundary and attempted to trespass into the property and he has no right to do so and therefore he is to be restrained by a permanent prohibitory injunction from trespassing into the property. Appellant resisted the suit contending that he

acquired one acre of the property under Ext.B1 registered marupat dated 19.6.1958 and another 15 cents as per an oral lease from Pullancheri Manakkal Madhavan Namboodiripad and later he purchased jenmom right from the Land Tribunal and obtained Ext.B3 purchase certificate and he has been in possession of 1 ½ acres which lies to the east of the property belonging to respondent and the lease hold property retained by Kelu @ Appa Nambiar after assigning to strangers alone is shown in the will and the identity is not clear and there is no separating boundary to demarcate the property belonging to the appellant and the respondent and respondent is not in possession of the disputed property and is therefore not entitled to the decree sought for. As identity of the property was disputed, trial court appointed a Commission. Commissioner submitted Ext.C1 report. After it was remmitted back, the Commissioner submitted Ext.C2 and C4 reports and Ext.C3 and C5 final plan.

2. Learned Munsiff, on the evidence of PW1, DW1 and Exts.A1 to A11, Ext.B1 to B8 and Ext.C1 to C8, found that properties obtained under Ext.A1 and bequeathed to respondent under Ext.A2 and correctly demarcated in Ext.C5 plan and

plaint schedule property is plots A, A1 and A2 and appellant is not in possession of the disputed plot A2 and respondent established his possession and is therefore entitled to the decree for injunction. The suit was decreed. Appellant challenged the decree and judgment before Sub Court, Thalassery in A.S.13 of 1991. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1)Whether the findings of courts below regarding plaintiff's title to the disputed plot A2 in Ext.C5 is vitiated by non-advertance to relevant materials and advertance to irrelevant materials and on misreading of evidence on record.

2) Whether courts below were justified in acting on Ext.A2 will without proving the same as provided under Section 68 of Indian Evidence Act.

4. Learned counsel appearing for appellant and respondent were heard. The argument of the learned counsel appearing for appellant is that even though Ext.A2 will was not proved by examining at least one of the attesting witness as mandated

under Section 68 of the Indian Evidence Act, courts below relied on Ext.A2 to uphold the title of respondent and without formal proof the will should not have been relied on. Learned counsel also argued that dispute in the suit was in fact on the identity of the property covered under Ext.A1 and belonging to the respondent and courts below did not properly appreciate the material evidence to uphold the correctness of Ext.C5 plan. It was argued that as per Ext.A1, property granted on lease was having only an east-west measurement of 60 feet Koles and plot A and A1 by themselves is having a measurement of 60 six feet Koles and added to this, plot A2 was also held to be part of the property obtained under Ext.A1 and if that be so, the east-west measurement would come to 74 six feet Koles and therefore the demarcation of the property under Ext.C5 plan is not correct and therefore courts below should not have relied on Ext.C5 to grant a decree. It is therefore argued that there is no evidence to prove that the disputed plot A2 forms part of the property obtained by the father of respondent under Ext.A1 or bequeathed to the respondent or that he has been in possession of the property and therefore decree and judgment granted by courts below though concurrent is not sustainable.

5. Learned counsel appearing for respondent argued that the trial court and first appellate court considered the correctness of Ext.C5 plan and found that properties were properly identified and the identification is correct and therefore that factual finding cannot be interfered. It was also pointed out that the measurement given in Ext.A1 is the middle measurement and therefore the correctness of the identification in Ext.C5 plan cannot be decided on the basis of the east-west measurement at the southern-most point of the plot and in any event, the middle measurement is less than 6 feet as identified by the Commissioner and there is no reason to interfere with the factual finding of the courts below and respondent established his possession of the disputed plot being the part of the property obtained under Ext.A2. It was also argued that the genuineness or execution of Ext.A2 will was not disputed and in such circumstances there is no necessity for examination of one of the attesting witnesses and Ext.A2 will was not disputed and in such circumstances there is no necessity for examining an attesting witness to prove the will and courts below rightly upheld the title and appeal is only to be dismissed.

6. The fact that father of respondent obtained 5 acres

covered under Ext.A1 from the jenmi Pullancheri illom in 1956 evidenced by Ext.A1 was not disputed. The fact that on the death of Appa Nambiar, his rights devolved on his legal heirs including respondent cannot be disputed. The fact that Appa Nambiar had executed a registered will whereunder one acre was bequeathed to the respondent was also not disputed. Ext.A2 will was produced and marked before the court below. When Ext.A2 will was marked there was no objection with regard to the mode of proof of the will. In fact, in the written statement, neither the genuineness nor the execution of Ext.A2 will was questioned. In such circumstances the question is whether a formal proof of the will by examination of at least one of the attesting witness to the will as provided under Section 68 of the Indian Evidence Act is warranted.

7. An identical question was considered by a Division Bench of this court in **Thayyullathil Kunhikannan and 3 others V. Thayyullathil Kalliani & 2 others (1**990(1)KLT 114). The Division Bench held that when Rule 5 of Order VIII provides that unless there is a specific denial of an allegation of fact made in the plaint, it shall be taken to be admitted and under Section 58 of the Evidence Act, a fact which is admitted need not be proved

in any proceedings. Section 68 of Evidence Act provides that if a document is required by law to be attested, it shall not be used as evidence, until one attesting witness at least, has been called for the purpose of proving its execution, if there be an attesting witness alive. Section 63 of Indian Succession Act provides the special requirements necessary to prove the will. The Division Bench held that Section 68 of Evidence Act relates to those documents which require to be proved, at the trial of a suit and if by any rule of law or of pleadings such proof is not required, Section 68 cannot operate to insist on formal proof and as obviating the necessity for calling an attesting witness unless the execution of the will or the attestation is in dispute. It was held that in the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on an examination of an attesting witness before a will can be used as evidence. In view of the Division Bench decision when appellnt did not dispute the genuineness or execution of the will, even without examination of one of the attesting witnesses to the will Ext.A2 will can be relied on as has been done by courts below. Therefore on that ground judgment cannot be challenged.

8. Under Ext.A1, 5 acres in Survey No. 23 was obtained by

the father of appellant. Commissioner in Ext.C5 plan identified the said 5 acres as plot A, A1, A2, C, C1, D and D1. Out of the 5 acres, one acre was bequeathed by the father in favour of respondent. Commissioner identified the said plot as plots A, A1 and A2. Though it was argued by learned counsel that the east west measurement as per Ext.A1 is only 60, six feet koles and that measurement will be exhausted even by plot A and A1 and therefore plot A2 cannot be taken as part of the property obtained under Ext.A1 or bequeathed to respondent under Ext.A2. But a property cannot be identified by taking the east-west measurement or north-south measurement, either on the southern extremity as is the case canvassed by appellant, or on the northern extremity. The measurement given is middle measurement. If that be so, the middle measurement of plot C and C1 is only 55 six feet Koles which is less than what is provided under Ext.A1. The trial court and first appellate court appreciated the evidence in the proper perspective and entered a factual finding that plot A2 forms part of the property covered under Ext.A1 and A2 and therefore respondent has title and possession to the property. I do not find any material which was overlooked by courts below or any irrelevant material which was

relied on by the courts below warranting reappreciation of evidence in exercise of the powers of this court under Section 100 of Code of Civil Procedure. There is no merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-